SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 265

CLARENCE W. BLAIR,
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation.

ON WRIT OF CERTIORARI

To The Supreme Court of Pennsylvania

PETITIONER'S BRIEF

J. THOMAS HOFFMAN,
620 Berger Bldg.,
Pittsburgh, Pa.

RANDALL B. LUKE,
Ellwood City, Pa.
Attorneys for Petitioner.

INDEX

Subject Index.

Table of Authorities.

CONSTITUTION & STATUTES CITED.

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 265

CLARENCE W. BLAIR,
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

PETITIONER'S BRIEF

OFFICIAL REPORT OF OPINIONS BELOW

The opinion of the Common Pleas Court of Allegheny County, Pa., (R. 133) is not officially reported.

The opinion of the Supreme Court of Pennsylvania (R. 144) is reported at 349 Pennsylvania Reports 346; 37A (2d) 736.

GROUNDS OF JURISDICTION

The question presented in this case is a substantial one. It is, briefly, the right of Petitioner to recover from Respondent under the Federal Employers' Liability Act (U.S.C.A., Tit. 45, 51-59) under the evidence adduced at the trial, when viewed in the light most favorable to petitioner. The interpretation of the Act is necessarily involved, and the right of submission of the issue to the jury was denied by the Supreme Court of Pennsylvania, as a matter of law. The question is what constitutes actionable negligence under the Act, and the Opinion of the Supreme Court of Pennsylvania is not in accord with the applicable decisions of this Court. The applicability of the Federal Employers' Liability Act is not in controversy and the decision of the Supreme Court of Pennsylvania is based entirely upon the interpretation of the Act, holding the Act applicable and purporting to determine Petitioner's rights thereunder; denying however, that he had a cause of action under the terms thereof. The opinion begins:

> "Plaintiff sued under the Federal Employer's Liability Act of April 22, 1908, c. 149, 35 Stat. 65, 45 U.S.C.A. 51 et seq."

It is not denied that Petitioner's Statement of Claim pleaded facts which, if proved, brought the case within the purview of the Act.

Section 237 of the Judicial Code, as amended (U.S. C.A., Tit. 28, Sec. 344), provides in its pertinent portion:

"(b) It shall be competent for the Supreme Court, by certiorari to require that there shall be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is especially set up or claimed by either party under . . . any statute of . . . the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. . . ."

The jurisdiction of this Court to review the judgment below is supported by:

Seaboard Air Line Ry. v. Renn 241 U.S. 290, 60 L.ed. 1006, 36 S. Ct. 567; C. R. I. & P. Ry. Co. v. Devine 239 U.S. 52, 60 L.Ed. 140, 36 S. Ct. 27 Union Pac. R. Co. v. Hadley 246 U.S. 330, 62 L.Ed. 751, 38 S. Ct. 318.

STATEMENT OF THE CASE

This is an action at law brought by Petitioner against Respondent in the Common Pleas Court of Allegheny County, Pennsylvania under the provisions of the Federal Employers' Liability Act to recover for personal injuries sustained by Petitioner while in the employ of Respondent and engaged at the time of the injury in unloading an interstate shipment of merchandise. The case was submitted to the jury to pass on the issues of whether Respondent furnished reasonably adequate

tools and appliances to perform the work; whether Respondent furnished reasonably sufficient and competent help to perform the work and whether the men hastily summoned to perform extraordinary duties were negligent in the performance thereof. The jury found Respondent negligent and assessed the damages at $12,000.00. Respondent moved for *Judgment Notwithstanding the Verdict* and also moved for a new trial. The Court overruled the motion for Judgment Notwithstanding the Verdict but granted the motion for a new trial on the ground, as stated in the opinion (R 135) that the Court submitted to the jury the questions of negligence in three particulars, failure to provide adequate equipment, failure to provide sufficient help and carelessness of its employees; that there was sufficient testimony to support the third particular, and therefore to permit the plaintiff to recover, but that there was no sufficient testimony to support the first and second, although under the charge of the court, the jury was permitted to base a recovery on either. The court said: "We can not now determine on which particular the jury found the defendant had been negligent, and a new trial will be granted. Because we considered the verdict in this case to be just and reasonable, we have deliberated a long time before ordering a new trial." (R. 136)

Respondent appealed to the Supreme Court of Pennsylvania from the refusal of the trial Court to grant its motion for Judgment n.o.v., and your Petitioner thereafter appealed from the order granting a new trial, on the ground that if the case were again tried, under the rule of *stare decisis*, two of his three allegations of negligence would not be submitted to the jury, thereby un-

duly narrowing his cause of action and resulting chance of recovery. The Supreme Court of Pennsylvania sustained Respondent's appeal and entered judgment for Respondent; the Court holding there was no evidence of the sole remaining allegation of negligence, to-wit: the negligence of the fellow-employees' for submission to the jury. Thus by a series of decimations the allegations of negligence were by two and one all killed off, and Petitioner's right to trial by jury was denied.

Petitioner, Respondent's sole freight house employee at Ellwood City, Pa., in unloading a car of merchandise on June 26, 1939 at the freight house, came upon three thirty foot lengths of greased seamless steel tubing ten inches in diameter and weighing in excess of one thousand pounds each. These tubes were lying on the floor of the freight car. Respondent provided no facilities by which a lone employee could remove the tubes from the car, except the nose-trucks and crow-bars (Photo R.138) which were grossly unsuited for moving heavy greased pipe of great length. Petitioner requested his superior, the station agent, to send the car to the consignee's plant, a few city blocks distant, for unloading, as had been done on former occasions when heavy shipments arrived, since the consignee had facilities for handling and unloading heavy objects. The station agent disapproved the suggestion and ordered Petitioner to unload the tubes and to call in Mr. Miller, an aging car-inspector and Mr. Fanno, the section-boss, to assist. When Petitioner questioned the ability of such improvised and inexperienced assistance, he was summarily informed by the station agent that if he couldn't do the work they would get somebody else who would. (R. 15)

Thereupon Petitioner with the car-inspector and the section-boss entered the box-car and succeeded in lifting one of the thirty foot tubes upon the five foot nose truck, the tube extending beyond the truck both fore and aft some twelve feet or more, and moving upon their haunches, holding the truck handles close to the floor to keep the greased tube on an even keel or in a horizontal position so that the forward end of it would not gouge into the floor and upset the unstable vehicle, they succeeded in making a number of zig-zagging movements to get the long tube out the center door of the box-car and across the steel plate from the car to the station platform, then through the freight house to the door on the far side where consignee's truck had arrived to receive the shipment. The floor of the freight house was rough, it had sunk so a beveled two inch plank had been nailed on the floor just inside the door to make the descent from the platform more gradual. The first tube was managed. The second, while being similarly transported across the freight house floor with the men moving in a crouching position struck an uneven place in the floor and the greased pipe started to slip from its insecure moorings; the car inspector and the section boss let go their holds and scurried for safety; the pipe fell off kicking the nose truck backward with great violence, the leg of it striking Petitioner in the abdomen just under the floating ribs. Pneumonia contracted following his hospitalization and operation has left Petitioner in such delicate condition that even serving as a crossing watchman during the month of August proved too much for him and the company doctor ordered him off the job. Since then he has been totally disabled.

ASSIGNMENT OF ERRORS

1. The Supreme Court of Pennsylvania erred in holding there was no jury issue of negligence of Respondent's servants who released their hold on the pipe before exerting their utmost effort to prevent the accident.

2. In holding there was no jury issue as to whether a five foot nose-truck was a reasonably safe appliance to move a thirty foot long greased pipe weighing in excess of a thousand pounds.

3. In holding there was no jury issue of failure to supply reasonably sufficient and competent help when the master improvises a work gang of inexperienced infirm and aged men to perform heavy dangerous work with inadequate appliances.

4. In failing to consider the various elements of negligence as a whole and as inter-related, instead of denying each separately and as unrelated to the contributing elements.

ARGUMENT

The only mechanical tools and appliances furnished Petitioner, the sole employee in the Ellwood City freight house, to unload from a box car the thousand pound, thirty foot long, greased ten inch pipe, were two nose trucks and a dolly. (Photograph R. 138) These were obviously designed to move trunks, bales and boxes and were wholly unsuited to move greased cylindrical objects of great length and weight which overhung the five foot nose truck a distance of twelve feet or more both fore and aft. Then too, the pipe had to rest on the horizontal metal nosing at the truck's forward end, with nothing to secure it or prevent its dangerous shifting or sliding or rolling except the steadying hands of two hastily summoned, unskilled and inexperienced, aging and infirm, albeit kindly and willing members of the improvised labor gang. The manual movement of heavy pipe calls in common knowledge for the employment of pipe tongs, where the bearers walking abreast on both sides of the pipe, spaced at intervals along its entire length, each carrying a fractional part of the load and the factor of safety being such that should one man inadvertently slip or lose his hold it wouldn't result in dire consequences to the others similarly employed. Goose neck cranes, portable chain hoists and blocks and tackles are among the well known appliances in general use for moving such loads with facility and ease.

When the master in modern industry or transportation employs methods that savor of the ox-cart era, and peremptorily orders his servant to encounter dangerous work with inadequate and insufficient tools and appliances

and with inexperienced and unskilled help, hastily summoned from employments requiring little or no muscular exertion, to perform a temporary assignment requiring great physical strength and vigor, and an easily to be anticipated accident results because of the lack of strength coupled with inadequate tools, and a willing workman's earning power is thereby permanently destroyed, resulting in calamity to his family, may it be said there is no culpability on the part of the master, for the jury's consideration under the provisions of a wise and humane statute which provides for liability if the accident be due in whole or in part to insufficiency in men or appliances and/or the negligence of fellow employees?

The trial court after refusing the motion for a directed verdict and after the jury returned a verdict in the sum of $12,000.00 for Petitioner, refused Respondent's motion for *judgement nothwithstanding the verdict* but granted the motion for a new trial solely on the ground (Court so certified R.137) that the Court had erred in submitting to the jury for its consideration the questions of whether the master complied with his common law primary duties of furnishing reasonably safe tools and appliances with which to perform the work and reasonably sufficient and competent help to assist in the performance. Those, we submit, were both questions of fact for the consideration of the fact finding body. We submit the learned trial court was right the first time when he submitted those questions to the jury and only erred when he later concluded he was wrong in so submitting them. The Court stated in the opinion: (R.136)

"Because we considered the verdict in this case

to be just and reasonable, we have deliberated a long time before granting a new trial,"

The Court was likely torn between varying considerations to grant or refuse a new trial.

The new trial never was reached, Respondent appealed to the Supreme Court of Pennsylvania from the refusal of its motion for *judgment notwithstanding the verdict* and Petitioner then also appealed from the order granting a new trial, believing the trial Court had committed no error warranting a retrial. Petitioner appealed for the further reason that should the case be retried, under the rule of *stare decisis*, at the second trial two of his three allegations of negligence would not be submitted to the jury, thereby depriving him of the benefit before the jury of the two most culpable insufficiencies—men and machines.

PENNSYLVANIA SUPREME COURT OPINION

The Pennsylvania Supreme Court in its opinion (R.143) simply says:

> "In addition to alleging the element of inadequate equipment and insufficient help, as to which the Court said there was no evidence, the plaintiff alleges he was injured by the negligence of the defendant's servants. We think there was no evidence of such negligence."

The learned Court accepts as final and without comment the action of the trial court in ruling out two of the three allegations of negligence which had been submitted to

the jury and completes the destruction of Petitioner's constitutional guarantee by striking down the last remaining allegation of negligence which we proved to the jury's satisfaction.

Continuing, the Pennsylvania Supreme Court says:

> "We see nothing in that evidence that would justify finding that defendant's servants were negligent in handling the freight. As the witness said, when the pipe was balanced on the truck, "All you had to do was push and steady it"; a risk of the employment was that the equilibrium of the pipe might be disturbed but that was a risk which the workman assumed."

Yes, all one had to do, if, as and when he could keep the greased pipe perfectly *balanced* was to crouch, keep the pipe perfectly horizontal while moving it across the uneven floor, keep the truck handles close to the floor, push the heavy unstable load while in a stooped position and move and steady it at the same time. It sounds simple. But crossing Niagara Falls on a slack wire also sounds simple; all one has to do when he is *balanced* is to plant one foot ahead of the other and make for the Canadian shore.

The Court says a risk of the employment is that the equilibrium of the pipe might be disturbed. That statement we think is not sufficiently comprehensive. The risk is not assumed until the servant knows and appreciates the hazard. It is not assumed when the servant is summarily directed to move heavy pipes of a size he had had no previous experience in moving.

Q. You never unloaded any before in the freight house?

A. I unloaded different kind of tubing, not of this nature, as large or as long as these three pieces were. (35 R)

****

Q. Before you had gone in the agent's office in the freight house had you tried to lift the tubing?

A. No sir, I didn't try because it was customary with large stuff that came to the National Tube to leave it in the car and seal the car again and shove it up into their mill where they had proper equipment for unloading heavy material.

Q. Had you ever shipped up steel tubing before?

A. Yes, sir.

Q. Only three pieces of it?

A. Even as low as one piece. (R.35)

Nor does one assume the risk of working with men whose skill he had not had time to appraise:

Q. You never worked with Mr. Fanno before?

A. He never helped me unload material. (R.35)

Nor does one assume the risk under the statute of being required to perform work with inadequate appliances such as a five foot nose truck to move a thirty foot pipe; the truck not being designed to carry cylindrical objects of great weight and length.

But the Respondent argues Petitioner was not directed to use the nose truck in moving the pipe. That is true, but he had to use something and it is not contended that he had the choice of more suitable appliances for the purpose.

Continuing the Court says:

> "The mere happening of this unfortunate accident is not evidence of negligence, the obvious risk of the employment was that the pipe might get out of balance and if it did, that men would instinctively act to protect themselves."

We submit the mere happening of this accident with its attendant circumstances evidences a gross disregard for the safety of the Petitioner both as to furnishing him reasonably adequate or sufficient tools and appliances with which to perform the work assigned him; that the mere happening of this accident was the readily to be anticipated result of failure to supply reasonably skilled and vigorous assistants to perform heavy, dangerous work. The hastily summoned car-inspector and section-boss unused to this type of work or perhaps to any manual lifting or steadying of great weights at all, constituted a grotesque Gilbert & Sullivan comic opera working gang. The mere happening of this unfortunate accident bespeaks not "Saftey first" but safety last. The servant's primary duty is obedience. He may not be too critical of the master's methods.

The Supreme Court of Pennsylvania erred in failing to consider the respective allegations of negligence as a whole. Pulling each separate factor from its factual set-

ting distorts and discolors the facts as a whole and is completely opposed to the standard of interpretation laid down for this Act by the late Mr. Justice Holmes:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the Court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

Union Pac. R. Co., vs. Hadley, 246 U.S. 330, 62 L. Ed. 751, 38 S. Ct. 318.

It is difficult to conceive of a judicial view of the facts here presented more in conflict with the principle of liberal construction of the Act in the light of its prime purpose, the protection of employees against injury, set forth by Mr. Justice Murphy in *Lilly vs. Grand Trunk W.R. Co.*, 317 U.S. 481, 87 L.Ed.323, than the view accorded these facts by the Supreme Court of Pennsylvania.

AUTHORITIES

Pederson vs. D. L. & W. R. R. Co., 229 U.S. 147

This was an action under the Federal Employers Liability Act to recover for personal injuries sustained through the negligence of co-employes. At the trial the court refused to direct a verdict for de-

fendant; the jury found for plaintiff. Subsequently the Court following the local statute (Penna. Laws 1905 p. 286 c. 198) entered judgment for the defendant notwithstanding the verdict, on the ground that the latter was not sustained by the evidence. Mr. Justice Van Deventer in the opinion said "In this the Court was in error, first because it was without authority to do so. (*Slocum vs. N. Y. Life Ins. Co.*, 228 U.S. 364) and second because the evidence did not warrant such a judgment."

Thomkins vs. Erie R. R. Co., 98 Fed. 2nd 49
Certiorari denied 305 U.S. 637
Rehearing denied 305 U.S. 673

"A plaintiff has a right to a jury trial in an action for injuries when any issue of fact remains to be settled."

Robostelli vs. N. Y. R. Co., (C.C.A. N. Y. 1888)
33 Fed. 796

"This amendment guarantees the right to have all questions of fact as to negligence passed upon by a jury, and the right involves not only the existence of the facts themselves, but the inference as to the exercise of due care to be drawn from the facts when established"

Justices vs. Murray (N. Y. 1870)
9 Wall 278; 19 L.Ed. 658

This clause applies to the appellate powers of the United States in all common law cases coming up

from inferior federal courts and also in cases of federal cognizance coming up from a state court.

Chicago R. Co. vs. Chicago, 166 U.S. 242.

The last clause of this amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought to the Supreme Court of the United States by writ of error from the highest court of the state.

Jacob vs. City of New York, 315 U.S. 752

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

Ives vs. Grand Trunk R. R. Co.
35 Fed. 176, Affirmed 144 U.S. 408

The weight and balancing of evidence are for the jury and their conclusion upon it in respect to its preponderance when fairly reached, is not reexaminable. When a case is such that it must be submitted to a jury, conclusiveness of the verdict must follow.

THE SUPREME COURT OF PENNSYLVANIA ERRED IN HOLDING THERE WAS NO JURY ISSUE

Chicago & N. W. R. Co. vs. Bowers, 241 U.S. 470

"The rule of law is: That the employer is under duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, but it is not required to furnish the latest, best and safest appliances, provided those in use are reasonably safe and suitable."

Tiller vs. Atlantic & C. L. R. Co., 318 U.S. 54

". . . Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

"Where the facts are in dispute and the evidence in relation to them is that from which fair minded men may draw different inferences, the case should go to the jury."

Union Pac. R. Co. vs. Hadley, 246 U.S. 330

"On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling on each. But the whole may be greater than the sum of its parts and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks sep-

arately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question."

Galloway vs. U. S. (Cal. 1943) 319 U.S. 372; rehearing denied 320 U.S. 214

The remedy for abuse of discretion by court in ruling on question whether evidence is sufficient for submission to jury is by correction on appellate review. The essential requirement in determining whether evidence is sufficient for jury is that mere speculation be not allowed to do the duty of probative facts after making due allowances for all reasonably possible inferences favoring party whose case is attacked.

Bailey vs. Central Vermont Ry., 319 U.S. 350

The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. *Jones vs. E. Tenn. V. & G. R. Co.*, 128 U.S. 128.

To withdraw such questions from the jury is to usurp its functions. The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence. It is a part and parcel of the remedy afforded railroad workers under the Federal Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly

portion of the relief which Congress has afforded them.

Great Northern R. Co. vs. Leonidas, 305 U.S. 1

"We are not prepared to say that the hazard of carrying a railroad tie was so open and obvious that the plaintiff as a matter of law must be held to have assumed the risk of injury by yielding obedience to the command of the foreman. He lifted and carried it successfully until he stepped on the rock and turned his ankle, at which time he fell with the weight on his back. This was a situation that the jury was warranted in finding defendant railway company and its foreman in the exercise of reasonable care, should have anticipated in the light of common experience. "

Northern Pacific R. R. Co. vs. Herbst, 116 U.S. 464

"A servant does not by his contract of employment assume the risks arising from the want of sufficient and skillful co-laborers. The liability of the employer is the same whether he totally fail to provide persons to perform a duty he owes his servants, or provide persons who are unskilled and incompetent."

Tenant vs. Peoria, P. U. Ry. Co., 321 U.S. 29.

"A judgment for defendant notwithstanding a verdict for plaintiff deprived the latter of the right of trial by jury."

"The court is not free to reweigh the evidence and set aside the jury verdict merely because the jury

could have drawn different inferences or conclusions or because the court regards another result as more reasonable."

C. R. I. & P. R. Co. vs. Ward, 252 U.S. 18

"The defense of assumption of risk is inapplicable when the injury arises from a single act of negligence creating a sudden emergency without warning to the servant or opportunity to judge the resulting danger."

C. B. & Q. vs. U.S., 220 U.S. 574

"It is quite conceivable that Congress contemplated the inevitable hardship of such injuries and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard."

It is respectfully submitted that the judgment of the Supreme Court of Pennsylvania should be reversed; that the order of the Common Pleas Court of Allegheny County, Pennsylvania granting a new trial be overruled and judgment ordered to be entered on the verdict.

J. Thomas Hoffman
Randall B. Luke
Attorneys for Petition